

1  
2  
3  
4  
5  
6  
7  
8 **United States District Court**  
9 **Central District of California**

10 PINI USA, INC.; PINI POLSKA SP.  
11 Z.O.O.,

12 Plaintiffs,

13 v.

14 NB GLOBAL COMMODITIES, LLC,  
15 Defendant.  
16

Case № 2:17-CV-04763-ODW-PLA

**ORDER GRANTING PLAINTIFFS’  
MOTION TO DISMISS  
DEFENDANT’S FIRST AMENDED  
COUNTERCLAIM [29]**

17 **I. INTRODUCTION**

18 Before the Court is Plaintiffs and Counter-Defendants Pini USA, Inc. and Pini  
19 Polska SP. Z.o.o.’s (collectively “Pini”) Motion to Dismiss Defendant and Counter-  
20 Claimant NB Global Commodities, LLC’s (“NB Global”) First Amended  
21 Counterclaim. (Mot., ECF No. 29.) NB Global opposed Pini’s Motion on October 2,  
22 2017. (Opp’n, ECF No. 30.) On October 6, 2017, Pini replied. (Reply, ECF No.  
23 33.)<sup>1</sup> For the following reasons, the Court **GRANTS** Pini’s Motion.

24 **II. BACKGROUND**

25 This action stems from an ongoing relationship whereby Pini agreed to prepare  
26 and sell, and NB Global agreed to buy, various pork products. On June 28, 2017, Pini  
27

28 <sup>1</sup> After considering the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

1 filed its Complaint alleging that NB Global breached a number of the parties'  
2 contracts, in the form of purchase orders, when NB Global failed pay for certain goods  
3 that NB Global accepted or wrongfully rejected. (Compl., ECF No. 1.) On August  
4 10, 2017, NB Global answered Pini's Complaint and filed a Counterclaim against  
5 Pini. (ECF Nos. 21, 22.) On September 9, 2017, NB Global filed its First Amended  
6 Counterclaim, alleging causes of action for breach of contract, breach of covenant of  
7 good faith and fair dealing, breach of implied warranty of merchantability, breach of  
8 implied warranty of fitness for particular purpose, and unfair business practices under  
9 California Business & Professions Code § 17200, et seq. (First Am. Countercl.  
10 ("FAC"), ECF No. 28.)

11 In the FAC, NB Global alleges the following facts, which the Court takes as  
12 true and construes in the light most favorable to NB Global. *See, e.g., Schueneman v.*  
13 *Arena Pharm., Inc.*, 840 F.3d 698, 704 (9th Cir. 2016) (restating the generally-  
14 accepted principle that "[o]rdinarily, when we review a motion to dismiss under  
15 Federal Rule of Civil Procedure 12(b)(6), we accept [counterclaimant's] allegations as  
16 true and construe them in the light most favorable to the [counterclaimant]") (internal  
17 quotation marks and citation omitted).

18 Beginning in August 2015, NB Global and Pini entered into a series of purchase  
19 orders, whereby NB Global ordered various fresh, non-GMO, hormone- and  
20 antibiotic-free pork products, including bacon, pork chops, salami, and sancocho  
21 (fried pork skins), that were to be produced in, and imported from, Poland. (FAC  
22 ¶¶ 7, 17.) Pini was required "to produce, ship, and deliver the pork products in a  
23 timely manner and up to specification."<sup>2</sup> (*Id.* ¶ 9.) NB Global alleges that it had an  
24 agreement with a national discount store chain to distribute the pork products it  
25 ordered from Pini. (*Id.* ¶ 8.)

---

26  
27  
28 <sup>2</sup> As explained further below, NB Global does not allege from what contract, if any, many of these duties arise.

1 NB Global placed its first order with Pini in August 2015 (the “August 2015  
2 Order”).<sup>3</sup> (*Id.* ¶ 10.) Pini failed to ship the product until “mid-2016,” making NB  
3 Global unable to distribute the product to its customer until September 2016. (*Id.*  
4 ¶ 12.)

5 In June 2016, NB Global ordered bacon and pork chops from Pini (the “June  
6 2016 Order”).<sup>4</sup> (*Id.* ¶ 13.) Pini delivered some of the June 2016 Order late. (*Id.* ¶ 14.)  
7 For some of the products ordered, Pini delivered “mis-labeled or un-labeled bacon  
8 containers” that did not comply with USDA standards. (*Id.* ¶ 15.) Pini shipped pork  
9 chops for purchase order #12134529 that contained xanthan gum. The presence of  
10 xanthan gum prevented NB Global from distributing the pork chops because NB  
11 Global would have been required to label them as “Pork Chop with Water-Binding  
12 Product.” (*Id.* ¶ 16.) NB Global also alleges that some of Pini’s pork chops tested  
13 positive for listeria. (*Id.*)

14 In August 2016, NB Global placed additional orders for fried pork skins, also  
15 known as sancocho (the “August 2016 Order”).<sup>5</sup> (*Id.* ¶ 17.) Pini failed to notify NB  
16 Global when the sancocho shipped, causing the product to remain at ports in Houston  
17 and Los Angeles at extra cost to NB Global. (*Id.* ¶ 19.) When NB Global received  
18  
19

---

20 <sup>3</sup> It is not clear whether NB Global is alleging that the August 2015 Order was for just bacon or for  
21 bacon *and* pork chops. NB Global first states that the order was for 90,000 units of 4.5 oz. of  
22 smoked bacon. (FAC ¶ 10.) In the next paragraph, NB Global states that “[Pini] breached the  
23 purchase order by failing to produce, ship, and deliver in a timely manner the smoked bacon *and*  
24 *pork chops*. (*Id.* ¶ 11 (emphasis added).) Then, in the next paragraph, NB Global complains of late  
25 delivery of that order, but only as to bacon. (*Id.* ¶ 12 (“The bacon was not shipped until mid-2016 . .  
.”).) Also, unlike the other orders referenced in the FAC, NB Global does not allege a specific  
purchase order number for the August 2015 Order. As explained below, this is only one of the many  
problems with NB Global’s FAC.

26 <sup>4</sup> NB Global lists the following purchase order numbers in the FAC as those memorializing the June  
27 2016 Order of bacon and pork chops: 12134529, 12134800, 112134801, 1213802, 1213803,  
1213804, 1213805, 1213806, 1213807, 1213810, 1213811, 1213812, 1213813, and 1213814. (*Id.*  
¶ 13.)

28 <sup>5</sup> NB Global alleges that the following purchase numbers make up the August 2016 Order:  
12134681, 12134682, and 12134683. (*Id.* ¶ 17.)

1 the sancocho, it was not up to NB Global’s “specifications” because some of the  
2 sancocho did not contain fat and the shipment was not uniform in size. (*Id.* ¶ 20.)

3 NB Global placed another order in November 2016 for salami and pepperoni  
4 (the “November 2016 Order”).<sup>6</sup> (*Id.* ¶ 21.) The terms of the November 2016 Order  
5 “required [Pini] to use the correct ingredients for food coloring.” (*Id.* ¶ 22.) Instead  
6 of using the “correct” ingredient, Pini used paprika powder that caused the coloring of  
7 the food to fade after a few weeks. (*Id.* ¶ 23.)

8 Pini argues in its Motion to Dismiss that the FAC is deficient because NB  
9 Global does not allege that it notified Pini of any defects in the products, a prerequisite  
10 for NB Global’s breach of contract claim. Pini also asserts that the FAC fails to state  
11 a claim as to any of NB Global’s five causes of action. The Court addresses each of  
12 Pini’s arguments, in turn, below.

### 13 III. LEGAL STANDARD

14 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable  
15 legal theory or insufficient facts pleaded to support an otherwise cognizable legal  
16 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To  
17 survive a dismissal motion, a complaint need only satisfy the minimal notice pleading  
18 requirements of Rule 8(a)(2)—a short and plain statement of the claim. *Porter v.*  
19 *Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations must be enough to  
20 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550  
21 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient factual matter,  
22 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*  
23 *Iqbal*, 556 U.S. 662, 678 (2009).

24 The determination whether a complaint satisfies the plausibility standard is a  
25 “context-specific task that requires the reviewing court to draw on its judicial  
26 experience and common sense.” *Id.* at 679. A court is generally limited to the

---

27  
28 <sup>6</sup> NB Global alleges that the November 2016 Order was memorialized in purchase orders 12134808  
and 12134809. (*Id.* ¶ 21.)

1 pleadings and must construe all “factual allegations set forth in the complaint ... as  
2 true and ... in the light most favorable” to the plaintiff. *Lee v. City of L.A.*, 250 F.3d  
3 668, 688 (9th Cir. 2001). But a court need not blindly accept conclusory allegations,  
4 unwarranted deductions of fact, and unreasonable inferences. *Spewell v. Golden State*  
5 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

#### 6 IV. DISCUSSION

##### 7 A. Pini’s Request for Judicial Notice

8 Pini requests that the Court take judicial notice of the nineteen purchase orders  
9 referenced by number in the FAC.<sup>7</sup> (Req. for Judicial Notice Exs. 1–19, ECF No. 29-  
10 2.) NB Global objects on the grounds that Pini has not laid the foundation or  
11 established the authenticity for the purchase orders. (Objection to Req. for Judicial  
12 Notice, ECF No. 30-1.) NB Global, however, does not argue that the purchase orders  
13 attached to Pini’s Request are not, in fact, the purchase orders at issue in this case.  
14 Instead, NB Global argues that the Court should not consider the purchase orders and  
15 the underlying facts contained therein because they are “subject to dispute and are not  
16 authenticated.” (Opp’n 8, ECF No. 8.)

17 Generally, when ruling on a Rule 12(b)(6) motion to dismiss, a district court  
18 may not consider evidence outside of the pleadings. *See U.S. v. Ritchie*, 342 F.3d 903,  
19 907–08 (9th Cir. 2003). One exception to that general rule is when a document is  
20 incorporated by reference into a complaint. *Id.* at 908. “Even if a document is not  
21 attached to a complaint, it may be incorporated by reference into a complaint if the  
22 plaintiff refers extensively to the document or the document forms the basis of the  
23 plaintiff’s claims.” *Id.* If that is the case, “the defendant may offer such a document,

---

24 <sup>7</sup> For the twentieth purchase order referenced in the FAC, for the August 2015 Order, NB Global  
25 does not provide a purchase order number. (*See* FAC ¶¶ 10–11.) Pini argues that NB Global did  
26 not, in fact, make an order in August 2015, because the company was not formed until October  
27 2015. (Mot. 3 n.3.) Because the Court (1) must accept the allegations in the FAC as true for the  
28 purpose of ruling on Pini’s Motion to Dismiss and (2) finds that NB Global has failed to state a  
claim as to the August 2015 Order on other grounds, the Court declines to address this argument.  
Therefore, Pini’s Request for Judicial Notice as to Exhibit 20 is **DENIED**. (Req. for Judicial Notice  
Ex. 20, ECF No. 29-2.)

1 and the district court may treat such document as part of the complaint, and thus may  
2 assume that its contents are true for purposes of a motion to dismiss under Rule  
3 12(b)(6).” *Id.*

4 The Court finds that the purchase orders are incorporated by reference into the  
5 FAC. NB Global lists the relevant purchase orders, on which it bases its claims, by  
6 number in the FAC. Therefore, Pini may present, and the Court may consider, those  
7 purchase orders in ruling on Pini’s Motion to Dismiss. The Court **GRANTS** Pini’s  
8 Request for Judicial Notice as to Exhibits 1 through 19.

9 **B. Breach of Contract Claim**

10 Pini asserts that NB Global has failed to plead facts sufficient to support its  
11 claim that Pini breached the twenty purchase orders described in the FAC. (Mot. 11.)  
12 The Court agrees.

13 NB Global alleges that the parties memorialized their agreements through  
14 various purchase orders. (FAC ¶¶ 7, 10, 13, 17, 21.) NB Global does not allege that  
15 the parties’ agreements consisted of anything other than the terms in the various  
16 purchase orders. As described above, the Court has taken judicial notice of the  
17 nineteen purchase orders referenced by number in the FAC. These purchase orders,  
18 however, do not contain any of the requirements NB Global alleged Pini breached.  
19 None of the purchase orders mention any labeling specifications, requirements  
20 regarding xanthan gum, fat content, or the use of certain food coloring. (Req. for  
21 Judicial Notice Exs. 1–19.) Therefore, the Court finds that NB Global has failed to  
22 state a claim for breach of contract for breach of those requirements.

23 Pini also argues that the purchase orders fail to specify a specific delivery time  
24 and, therefore, NB Global has not alleged a breach of contract claim for late delivery  
25 of the goods. (Mot. 3.) California law requires that “[t]he time for shipment or any  
26 other action under a contract if not . . . agreed upon shall be a reasonable time.” Cal.  
27 Com. Code § 2309(1). NB Global alleges that some of Pini’s shipments were delayed  
28 up to nine months and others were delayed one week to two months. (FAC ¶¶ 11, 14.)

1 Although the “reasonableness” of delivery time is a fact-intensive inquiry, usually not  
2 to be decided on a Motion to Dismiss, the Court finds that NB Global has not alleged  
3 sufficient facts to state a claim that the timing of the Pini’s delivery was unreasonable  
4 under the circumstances surrounding the parties’ various agreements. For example,  
5 NB Global does not allege that the parties’ course of dealing or performance, or  
6 certain industry standards, made Pini’s delivery times unreasonable. Therefore, the  
7 Court finds that NB Global has failed to state a claim for breach of contract.

8 **C. Notification of Defects in Pork Shipments**

9 Pini additionally argues that NB Global’s breach of contract claim is deficient  
10 because NB Global failed to allege that it notified Pini of any defects in the various  
11 shipments. (Mot. 9, 14.) NB Global responds that (1) pre-suit notice is not required  
12 for a breach of contract claim and, alternatively, (2) it adequately alleged pre-suit  
13 notice in the FAC. (Opp’n 10.) The Court disagrees with NB Global on both points.

14 Under the California Commercial Code, a buyer is deemed to have accepted  
15 goods when the buyer “fails to make an effective rejection” after a reasonable  
16 opportunity to inspect them. Cal. Com. Code § 2606. Where the buyer has accepted  
17 tender of the challenged goods, “[t]he buyer must, within a reasonable time after he or  
18 she discovers or should have discovered any breach, notify the seller of breach or be  
19 barred from any remedy.” Cal. Com. Code § 2607(3)(A). The Ninth Circuit has held  
20 that California’s notice provision strictly requires pre-suit notice:

21 The purpose of giving notice of breach is to allow the breaching  
22 party to cure the breach and thereby avoid the necessity of  
23 litigating the matter in court. This purpose would be  
24 completely undermined if it could be satisfied with the giving  
of post-suit notice. For that reason, we agree with the district  
court . . . that the notice requirement means pre-suit notice.

25 *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011) (internal citations  
26 omitted). Further, “[t]o avoid dismissal of a breach of contract or breach of warranty  
27 claim in California, ‘a buyer must plead that notice of the alleged breach was provided  
28 to the seller within a reasonable time after discovery of the breach.’” *Id.* (quoting

1 *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010)).  
2 There can be no question that under California law, a party is required to plead that  
3 they provided pre-suit notice to adequately allege breach of contract.

4 Here, NB Global claims that it adequately alleged pre-suit notice of Pini's  
5 breach due to mislabeling of certain products, because paragraph 15 of the FAC  
6 provides that "[NB Global] had to arrange for correct labels" and "[Pini] sent  
7 corrected labels." (FAC ¶ 15.) NB Global argues that "Pini could not have resent the  
8 corrected labels unless NB Global notified Pini of the nonconforming goods." (Opp'n  
9 10.) The Court declines to allow NB Global to plead its case through implication. To  
10 satisfy Rule 8, NB Global must set forth facts sufficient to allege each element of its  
11 causes of action. Paragraph 15 does not sufficiently allege pre-suit notice. Even  
12 more, that paragraph speaks only to the mislabeling defect, and not the many other  
13 defects complained of in the FAC. Therefore, for this additional reason, the Court  
14 finds that NB Global has failed to adequately plead its breach of contract claim.

15 **D. Breach of Covenant of Good Faith and Fair Dealing Claim**

16 Pini argues that NB Global's claim for breach of the covenant of good faith and  
17 fair dealing should be dismissed because it is duplicative of its breach of contract  
18 claim. (Mot. 14.) A breach of the implied covenant of good faith and fair dealing  
19 involves something more than breach of the contractual duty itself. *Careau & Co. v.*  
20 *Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1394 (1990). If "the allegations  
21 do not go beyond the statement of a mere contract breach and, relying on the same  
22 alleged acts, simply seek the same damages or other relief already claimed in a  
23 companion contract cause of action, they may be disregarded as superfluous as no  
24 additional claim is actually stated." *Id.* at 1395. There are three exceptions to this  
25 rule: (1) where a breach of a consensual contract claim is not alleged, (2) where the  
26 [counter-claimant] is seeking recovery in tort, and (3) where the [counter-claimant]  
27 alleges that the defendant acted in bad faith to frustrate the contract's benefits.



1 *Celador Int'l Ltd. v. Walt Disney Co.*, 347 F. Supp. 2d 846, 852 (C.D. Cal. 2004)  
2 (citations omitted).

3 NB Global alleges that Pini:

4       breached the covenant of good faith and fair dealing by  
5       engaging in the following conduct, including, but not limited  
6       to: completely failing to provide the pork products in a  
7       timely manner, by providing products that did not conform  
8       to the standards and specifications agreed upon, and by  
9       failing to label or correctly label the pork products.

10 (FAC ¶ 33.) This is precisely the alleged conduct that NB Global relies upon for its  
11 breach of contract claim. Additionally, none of the three recognized exceptions apply:  
12 (1) NB Global is alleging a breach of contract claim, (2) it is not seeking recovery in  
13 tort, and (3) it has not alleged that Pini acted in bad faith. Therefore, the Court finds  
14 that NB Global's claim for breach of covenant of good faith and fair dealing is  
15 duplicative of its claim for breach of contract and must be dismissed.

16 **E. Breach of Implied Warranty of Merchantability Claim**

17 Pini argues that NB Global's claim for breach of implied warranty of  
18 merchantability claim fails because NB Global has not alleged that Pini's products  
19 were not fit for ordinary use. (Mot. 16–17.) To state a claim for breach of implied  
20 warranty of merchantability, a party must plead facts sufficient to show that “the  
21 product did not possess even the most basic degree of fitness for ordinary use.”  
22 *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 406 (2003). Alternatively, a party may  
23 base such a claim on a tendered product that does not conform to affirmative  
24 representations made by the seller. *Zakaria v. Gerber Prods. Co.*, No. LA CV15-  
25 00200-JAK-E, 2015 WL 3827654, at \*11 (C.D. Cal. June 18, 2015) (citing Cal. Com.  
26 Code § 2314(2)(f)).

27 In the section dedicated to this cause of action in the FAC, NB Global alleges  
28 that Pini breached the implied warranty of merchantability by providing pork chops  
containing xanthan gum and sancocho that did not meet the required specifications.  
(FAC ¶¶ 41–42.) NB Global does not allege whether the tendered pork chops or

1 sancocho were unfit for ordinary use, nor does it provide facts sufficient to establish  
2 that Pini made an affirmative representation as to the supposed “specifications.” As  
3 explained above, the Court finds that the purchase orders do not contain any such  
4 specifications.

5 NB Global does not respond to Pini’s arguments concerning the sancocho or  
6 pork chops containing xanthan gum. NB Global’s only response in support of its  
7 claim for breach of implied warranty of merchantability is that it has sufficiently pled  
8 a breach as a result of the presence of listeria in some of Pini’s pork chops. (*See*  
9 *Opp’n* 15.) The listeria claims, however, are not mentioned in the section of the FAC  
10 dedicated to merchantability. Instead, NB Global asks the Court to consider the facts  
11 alleged in the breach-of-contract section as incorporated by reference in the later  
12 section on merchantability. (*Id.*) While incorporation by reference is permitted under  
13 Federal Rule of Civil Procedure 10(c), the Court will not allow NB Global to rely on  
14 facts for its merchantability claim that are not mentioned at all in the relevant section  
15 of the FAC. Allowing such pleading would not provide Pini with “fair notice of what  
16 [NB Global’s] claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355  
17 U.S. 41, 47 (1957); *see also Saunders v. Saunders*, No. CV 1-05-0699-RCC, 2009  
18 WL 382922, at \*2 (E.D. Cal. Feb. 13, 2009) (“A complaint having the factual  
19 elements of a cause of action scattered throughout the complaint and not organized  
20 into a ‘short and plain statement of the claim’ may be dismissed for failure to satisfy  
21 Rule 8(a).”).

22 Additionally, NB Global’s claim fails because it has not sufficiently alleged  
23 how the presence of listeria renders uncooked pork “unfit for ordinary use.” NB  
24 Global alleges only that Pini “provided pork chops that tested positive for listeria,”  
25 without any explanation as to why or how that made the pork unfit. (FAC ¶ 16.) Pini  
26 argues, for example, that there is no requirement that raw meat be tested for listeria  
27 because proper cooking destroys the bacteria. (Mot. 17); *see also* 9 C.F.R. § 430.4  
28 (requiring testing and controls for listeria only in ready-to-eat pork products). While

1 the Court declines to decide now whether the presence of listeria in uncooked pork  
2 would or would not render to product unfit, it is clear from the face of the FAC that  
3 NB Global has not connected the dots as to why listeria makes the pork chops it  
4 ordered unsafe or unsellable. Nor has NB Global alleged that Pini made any  
5 affirmative representations regarding the presence of listeria, or lack thereof, in its  
6 products. For these reasons, the Court finds that NB Global has failed to state a claim  
7 for breach of implied warranty of merchantability.

8 **F. Breach of Implied Warranty of Fitness for Particular Purpose Claim**

9 Pini argues that NB Global has failed to state a claim for breach of implied  
10 warranty of fitness for a particular purpose, because NB Global’s asserted use, to re-  
11 sell the food items to stores, was an ordinary, not particular, purpose. (Mot. 17.) NB  
12 Global responds that its stated purpose of distributing the meat products is a  
13 sufficiently particular purpose. (Opp’n 16.) The Court disagrees.

14 The warranty of fitness for a particular purpose is implied by law when “a seller  
15 has reason to know that a buyer wishes goods for a particular purpose and is relying  
16 on the seller’s skill and judgment to furnish those goods.” *Martinez v. Metabolife*  
17 *Int’l, Inc.*, 113 Cal. App. 4th 181, 189 (2003). This warranty is breached when the  
18 goods are not reasonably fit for the intended purpose, causing injury. *Id.* The crux of  
19 the issue here is whether NB Global purchased pork products from Pini for a  
20 “particular purpose” such that it relied on Pini’s skill. Comment 2 to the relevant  
21 California statutory provision states:

22 A ‘particular purpose’ differs from the ordinary purpose for  
23 which the goods are used in that it envisages a specific use  
24 by the buyer which is peculiar to the nature of his business  
25 whereas the ordinary purposes for which goods are used are  
26 those envisaged in the concept of merchantability and go to  
27 uses which are customarily made of the goods in question.  
28 For example, shoes are generally used for the purpose of  
walking upon ordinary ground, but a seller may know that a  
particular pair was selected to be used for climbing  
mountains.

1 Cal. Com. Code § 2315, cmt. 2.

2 NB Global alleges that, at the time of purchase, Pini “knew or had reason to  
3 know that [NG Global] intended to obtain fresh and ‘up-to-specifications’ pork  
4 products in order for [NB Global] to stock the shelves of its national retail store  
5 customers.” (FAC ¶ 49.) The Court finds that NB Global has inadequately pled this  
6 cause of action. Meat products are ordinarily sold and used for human consumption,  
7 and NB Global’s status as a distributor in the supply chain does not mean that its  
8 purpose is “particular.” *See NuCal Foods, Inc. v. Quality Egg LLC*, 918 F. Supp. 2d  
9 1023 (E.D. Cal. 2013) (finding that plaintiff failed to state a claim against egg seller  
10 because repackaging and distributing unbroken shell eggs was not “peculiar to the  
11 nature” of plaintiff’s business). Additionally, as explained above, NB Global has not  
12 sufficiently alleged how Pini breached “specifications” that were not contained in the  
13 various purchase orders. Therefore, the Court **GRANTS** Pini’s Motion to Dismiss as  
14 to NB Global’s claim for implied warranty of fitness for a particular purpose.

15 **G. Unfair Business Practices Claim**

16 In the section of the FAC dedicated to NB Global’s claim of Unfair Business  
17 Practices, NB Global alleges merely that Pini violated section 17200 of the California  
18 Business and Professions Code by performing “the many wrongful actions described  
19 herein.” (FAC ¶ 59.) Pini argues that because NB Global’s other allegations fail, this  
20 one must necessarily fail as well. (Mot. 19.)

21 California’s Unfair Competition Law, Business & Professions Code § 17200,  
22 provides relief for “unfair competition,” which is defined as “any unlawful, unfair, or  
23 fraudulent act or practice and unfair, deceptive, untrue or misleading advertising.”  
24 *McVicar v. Goodman Global, Inc.*, 1 F. Supp. 3d 1044, 1049–50 (C.D. Cal. 2014)  
25 (citing Cal. Bus. & Prof. Code § 17200). NB Global claims that Pini violated  
26 California’s Uniform Commercial Code when (1) Pini did not deliver the goods in a  
27 timely manner; (2) Pini did not tender goods that were up-to-specifications; (3) certain  
28

1 orders contained xanthan gum or listeria; and (4) labels were not up-to-code per  
2 USDA standards for public safety. (Opp’n 18.)

3 First, the Court finds that NB Global fails to state a claim for unfair business  
4 practices, because it has failed to provide a “short and plain statement of the claim.”  
5 *Saunders v. Saunders*, 2009 WL 382922, at \*2. Instead, NB Global relies solely on its  
6 reference to “the many wrongful actions described” in other sections of the FAC.  
7 This is not sufficient to provide Pini notice of the claim. Second, the Court has  
8 already found that NB Global has not adequately alleged that the tendered products  
9 did not comply with various “specifications” or were unfit for consumption. Lastly,  
10 NB Global has not alleged that Pini’s supposed failure to label the products in  
11 conformance with USDA standards was unlawful. Therefore, the Court finds that NB  
12 Global has failed to state a claim for unfair business practices.

#### 13 **H. Leave to Amend**

14 As a general rule, a court should freely give leave to amend a complaint that has  
15 been dismissed. Fed. R. Civ. P. 15(a). But a court may deny leave to amend when  
16 “the court determines that the allegation of other facts consistent with the challenged  
17 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*  
18 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see also Lopez v. Smith*, 203 F.3d  
19 1122, 1127 (9th Cir. 2000).

20 Because NB Global could potentially amend the FAC in a way to correct the  
21 deficiencies identified in this Order, the Court allows NB Global leave to amend.  
22  
23  
24  
25  
26  
27  
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

**IT IS SO ORDERED.**

October 31, 2017

~~Chas Wright~~

**OTIS D. WRIGHT, II**  
**UNITED STATES DISTRICT JUDGE**